Nos. 49, 53, and 54

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 49

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellants*

v.

ELVIN L. REDDISH, ET AL., *Appellees*

No. 53

INTERSTATE COMMERCE COMMISSION, *Appellant*

v.

ELVIN L. REDDISH, ET AL., *Appellees*

No. 54

ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL., *Appellants*

v.

ELVIN L. REDDISH, ET AL., *Appellees*

Appeals from the United States District Court for the Western District of Arkansas

BRIEF FOR ELVIN L. REDDISH

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OPINIONS BELOW

The opinion of the District Court (R. 398) is reported at 188 F. Supp. 160. The report of the Interstate Commerce Commission (R. 385) is reported at 81 M.C.C. 35.

JURISDICTION

The final judgment and order of the District Court was entered on October 19, 1960 (R. 411). Notices of appeal were filed on December 16, 1960 (R. 412, 416, 418). This Court noted probable jurisdiction on April 17, 1961, 365 U.S. 897 (R. 421), and consolidated these cases, which are separate appeals from the same judgment. Jurisdiction of this Court to review the final judgment and order of the District Court is conferred by 28 U.S.C. 1253 and 2101(b).

QUESTIONS PRESENTED

1. May the Commission, under section 209(b) of the Interstate Commerce Act, as amended, presume an adverse effect on the services of protesting common carriers from the grant of a permit to a contract carrier to transport shipments the Commission finds have not been transported by the protesting common carriers and would not be transported by the protesting common carriers if the contract carrier application were denied?

2. May the Commission, under section 209(b) of the Interstate Commerce Act, as amended, as a condition to the grant of a contract carrier application, require the applicant and his supporting shipper to prove that existing common carrier service is not adequate to meet the transportaton requirements of the shipper?

3. May the Commission, under sections 203(a)(15) and 209(b) of the Interstate Commerce Act, as amended, refuse to consider the lower costs available to the shipper as a consequence of the inherent advantages of contract carrier service, in determining the distinct need of the shipper and the effect upon the shipper of a denial of the application?

STATUTES INVOLVED

The National Transportation Policy (54 Stat. 899, 49 U.S.C. preceding sections 1, 301, 901, and 1001); section 203(a)(15) of the Interstate Commerce Act (49 U.S.C. 303(a)(15), as amended on August 22, 1957, 71 Stat. 411, Public Law 85-163, 85th Cong.); section 209(b) of the Interstate Commerce Act (49 U.S.C. 309(b), as amended on August 22, 1957, 71 Stat. 411-412, Public Law 85-163, 85th Cong.); and section 212(c) of the Interstate Commerce Act (49 U.S.C. 312 (c), as added on August 22, 1957, 71 Stat. 411, Public Law 85-163, 85th Cong.), are set forth in the Appendix.

STATEMENT

Elvin L. Reddish filed an application with the Interstate Commerce Commission on May 13, 1958, for a permit to operate as a contract carrier transporting canned goods on behalf of Steele Canning Company, Cain Canning Company, and Keystone Packing Company, from three canning plants in Arkansas and one such plant in Oklahoma to customers located at points in thirty-three states, and to bring back for these canning companies, from points in thirty of those states to the plants in Arkansas and Oklahoma, materials and supplies used in producing canned goods.

Reddish lives at Springdale, Arkansas, where he owns a parking lot and a garage for the repair and maintenance of his trucks and trailers (R. 52). Prior to World War II he drove a truck for his father (R. 49). While in the Army during the War, he repaired trucks (R. 50). After the War he bought a truck and trailer which, with two others he later acquired, were used in trucking farm products, exempt under section

203(b) of the Interstate Commerce Act, 49 U.S.C. 303(b), from economic regulation of the Commission.

Beginning in 1953, Reddish leased his trucks to Steele Canning Company under contracts that required Reddish to keep the vehicles in repair. The trucks were operated by Steele's drivers and employees as a part of the extensive private carriage operation carried on by Steele in transporting its canned goods and the supplies used in production of canned goods. At the beginning of 1958, Reddish owned, and had under lease to Steele, nine trucks and trailers (R. 49-52).

Steele, Cain and Keystone, the shippers Reddish proposes to serve, are substantial canners of vegetables, potatoes, and berries, with plants in Northwestern Arkansas (R. 115, 213, 238). The sale of canned goods produced by the three companies is interrelated, since Steele normally sells and distributes about 75% of the production of Cain and Keystone (R. 373-374).[1] Shipments are made by Steele from the plant locations of the three companies, as well as from a plant located in Westville, Oklahoma, to customers located at a number of scattered localities in a thirty-three state area (R. 370). 80% of Steel's shipments are to small buyers who order three to ten thousand pounds of canned goods at any one time (R. 126, 371). These customers maintain low inventories, with rapid turnover of stock (R. 371). When stocks run low, customers place orders, principally by telephone, sometimes by mail or wire, on short notice, for delivery on

[1] Steele ships between two and a half and three and a half million cases of canned goods annually, depending upon the crop season. Of this volume, Steele produces between 500,000 to 800,000 cases. The remainder is purchased from other canners, including Cain and Keystone (R. 116-118, 122, 123).

specified days and in some cases at specified times of day (R. 128, 129). The canning business is highly competitive. There is a narrow profit margin. Cost as well as speed of delivery are controlling factors in the customers' choice of canners from whom they will purchase. A number of competing canners in the Arkansas Valley and elsewhere provide service on small shipments in their own vehicles (R. 147-148, 201-202). Because of these competitive factors, Steele, Cain and Keystone require a transportation service that will provide prompt movement of small shipments in consolidated loads to widely scattered customers, at a cost competitive with that of private carriage or for-hire truckload movements (R. 371). Without such transportation, the shippers could not sell their canned goods (R. 173).

A number of motor common carriers protested the grant of the Reddish application, and submitted evidence of their operating authorities and facilities, expressing a desire to participate in the traffic of the three canning companies (R. 375-381).[2] These carriers are not used by Steele, Cain and Keystone for the low-cost, pool-truckload, multiple drop-off service required for their small shipment business from the Arkansas and Oklahoma origins (R. 391). A pool truck-load of these small shipments normally requires six or more stops in transit for pick-ups and deliveries

[2] Four railroads, the Western Pacific; Great Northern; Denver Rio Grande and Western; and the Santa Fe, also appeared as protestants (R. 380-381). The Examiner found that none of the rail carrier protestants served any of the points in Arkansas or Oklahoma; that the total traffic in canned goods moved outbound from the Oklahoma and Arkansas plants by any railroad in the full year 1957 had been 19 carloads (R. 380, 381); that Cain Canning Company is not on a rail siding (R. 374).

at various points in two or more states (R. 389; see, *e.g.*, R. 92, 93). The protesting common carriers do not render such a service on a consolidated load basis at truckload rates (R. 353, 354). The small shipments that would go to make up such a pool truckload are handled as individual less-than-truckload (LTL) shipments at LTL rates (R. 194, 226). The handling of such an LTL shipment of canned goods by a motor common carrier may involve a number of pick-up and delivery services, terminal handling and joint line transfers in its movement from the canning plant to the company's customer, depending upon the particular cities and towns served by the common carrier, the arrangements made by that carrier with other carriers to serve other towns, and the way in which the carriers had scheduled their equipment (R. 194, 356). Shipments of canned goods in LTL service are subject to delay and damage in handling, terminal, and interlining processes (R. 173). The cost to Steele for the movement of LTL shipments of canned goods is two to three times as high as the cost of truckload movements (R. 394).

Steele began handling its small orders in consolidated truckload movements in its own private carriage operation in 1948 (R. 371-372). As the volume of the small orders increased, Steele expanded its private carriage fleet. In 1958, Steele was operating twenty-nine truck units (R. 372). Labor difficulties, including a strike in 1958, reduced this fleet to eight truck units at the time of the hearing (R. 372).

Reddish, who had previously filed this application, was granted emergency and temporary authority as a contract carrier by the Commission, to transport pool truckloads of canned goods for Steele, and to bring

back limited types of supplies and materials for producing canned goods (R. 46, 47). This temporary authority was issued to Reddish upon a finding by the Commission that there was an immediate and urgent need for the service, and that there was no existing carrier service capable of meeting the need.[3] Steele, however, continued thereafter to use its own eight vehicles in private carriage, since Reddish did not then have sufficient equipment to handle Steele's requirements. Steele did not expect Reddish to invest in additional operating equipment in reliance upon only a temporary permit (R. 159, 163, 204).

Reddish began transporting Steele's outbound shipments of small orders in consolidated loads in June, 1958, using his nine trucks and trailers (R. 58). Reddish provides direct transportation of the small shipments in consolidated truckloads, making drop-offs of the small orders at the customers' places of business (R. 59-62, 93, 94). His rate schedule and shipping documents available for examination at the hearing showed that this service in pooled truck movement of

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[3] Section 210a(a) of the Motor Carrier Act, 49 U.S.C. 310a(a), provides: "To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify, but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter." See *Pan-Atlantic S.S. Corp.* v. *Atlantic Coast Line R. Co.*, 353 U.S. 436.

small shipments was performed at a cost to the shipper comparable to truckload rates of common carriers (R. 60, 83, 84, 93, 95, 191). The service rendered by Reddish to Steele under temporary authority was found by the Examiner to be substantially similar to the private carriage operations performed by Steele (R. 372.

The Examiner, on this factual showing, concluded that Reddish's proposed service would "be more responsive to shipper's transportation requirements," and that it did not appear that the grant of authority to Reddish would "have any material adverse affect [sic] upon the operations of any other carrier" (R. 382). The Examiner recommended that the application be granted.

The Commission, Division 1, concluded that the Examiner's statement of facts was correct in all material respects, and adopted it as its own (R. 388). The Commission found that none of the protestant carriers had participated in the traffic of the shippers (R. 391). The Commission further specifically found that: "If the application is denied shippers will continue to use private carriage without resorting to further common carrier service because such carriers' less-than-truckload rates are considered prohibitive" (R. 390). The Commission also noted that Keystone, following the reduction in Steele's private carrier fleet, had begun to operate two trucks in private carriage and "will supplement its fleet if the application is denied and its small orders increase" (R. 391).

The Commission concluded, nevertheless, that the application should be denied in its entirety under section 209(b) of the Act, 49 U.S.C. 309(b).

The Commission concluded that Reddish, proposing to limit his service to three interrelated shippers, would be a *bona fide* contract carrier as defined in section 203(a)(15) of the Interstate Commerce Act, 49 U.S.C. 303(a)(15) (R. 393). The Commission concluded that physical transportation of canned goods in truckload and less-than-truckload volume, with multiple pick-ups and multiple deliveries, was a transportation service that could be performed by either common carriers or contract carriers by motor vehicle (R. 393). The Commission concluded that a grant of Reddish's application would have an adverse effect upon the service of the protesting carriers, stating: "It is clear that authorization of a new carrier to transport traffic which common carrier protestant can efficiently handle would have an adverse effect upon the service of that protestant" (R. 394). For this holding the Commission cited its decision in *J-T Transport, Inc.—Extension—Columbus, Ohio*, 79 M.C.C. 695, decided June 15, 1959.[4] The Commission in *J-T Transport* had concluded:

> ". . . we believe that our past holdings that existing carriers are entitled to transport all the traffic which they can economically and efficiently handle before additional authority is granted are equally valid today as they were prior to the 1957 amendments to the Act. There is, in effect, a presumption that the services of existing carriers will be adversely affected by a loss of *potential* traffic.

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[4] The *J-T Transport* proceeding is before this Court in numbers 17 and 18, October Term 1961. The decision of the Commission of June 15, 1959 in that proceeding appears at pages 29-53 of the transcript of record filed in this Court in numbers 563 and 564, October Term 1960, now renumbered 17 and 18.

even if they may not have handled it before" (J-T Record, p. 42).

The Commission held that, under section 209(b), the determination of the effect of the denial of the Reddish application upon Steele, Cain and Keystone depended upon a determination of whether "existing service is adequate to meet their transportation requirements" (R. 394). The Commission then said:

> "Aside from evidence pertaining to rates, the record is devoid of any substantial showing of dissatisfaction on the part of the shippers with existing service. Complaints about jointline service, slow transit time, and inability to arrange multiple pickups and deliveries are of a general nature, and are not substantiated by reference to specific instances. Although protestant motor carriers, especially those operating over regular routes, may be hindered in some instances by their authorities and the nature of their operations from achieving complete flexibility in effecting multiple pickups and deliveries, the supporting shippers have failed to show that they have been unable to obtain reasonably adequate service upon request. . . ." (R. 394).

The Commission concluded:

> "In the absence of a more positive showing that existing service will not meet shipper's reasonable transportation needs, we are not warranted in finding that a new service should be authorized or that the supporting shippers will be adversely affected by a denial of this application" (R. 394).

The Commission's ultimate conclusion, in denying the application, was:

> "There has been no convincing showing by applicant that the supporting shippers have a real

need for the proposed contract carrier service. On the contrary, the only serious complaint which shippers have against existing service is with the less-than-truckload rates of motor common carriers. Even should the application be granted, they assert, they will continue to use common carrier service to some extent. It may be fairly concluded, we believe, that their support of this application rests entirely upon a desire to obtain lower rates. This is not a sufficient basis to justify a grant of authority to a new carrier. If the shippers believe that the rates of presently authorized carriers are unjust or unreasonable, they should seek relief in actions against these carriers under appropriate provisions of the act. Under the circumstances, the application will be denied" (R. 395).

A petition by Reddish to the entire Commission, for oral argument and for reconsideration, was denied (R. 396-398).

Reddish filed this action against the United States and Interstate Commerce Commission, in the United States District Court for the Western District of Arkansas, to enjoin and to set aside the order of the Commission (R. 1). The United States, the statutory defendant under 28 U.S.C. 2322, filed an answer admitting the allegations of the complaint (R. 15). The Interstate Commerce Commission answered, defending the order (R. 10). Associations and groups of common carriers by motor and rail, and an association of contract carriers, were permitted to intervene as defendants and plaintiffs, respectively (R. 6, 12, 15, 17).

The District Court held that the order was invalid and should be set aside (R. 411). The Court held that statutory standards applicable to the consideration of

contract carrier applications were not authority for "limiting the inquiry" as to the effect of denial of Reddish's application to a "mere inquiry as to the adequacy of presently available service" (R. 405).

The Court held that a finding that the canning companies will not be adversely affected by a denial of the application was not supported by substantial evidence, considering all of the record, "including the evidence of the lower costs" of Reddish's service (R. 405).

The Court held that the adequacy of existing service, as applied in this case, was no different than a requirement that common carriers be "unable or unwilling" to transport the shipments. The legislative history of the 1957 amendments to sections 203(a)(15) and 209 of the Act demonstrated, said the Court,

> ". . . that it was [not] the intent of Congress that the approval or disapproval of an application for a contract carrier permit should be determined solely by reference to whether or not the proposed service is provided by common carriers, or one which they are unwilling or unable to provide" (R. 408).

The Court held that the Commission could not ignore lower costs to the shippers in the form of rates in determining the effect that denial of the permit would have upon the shippers. The Court said:

> "Our holding is that where the lower rates result from economies and advantages inherent in contract carrier operation, as they do in this instance, and there is a showing that efficient business operation requires the proposed tailored service—including the lower rates, as is reflected by the record in this instance, the Commission may not disregard this evidence in its evaluation of the effect

of a denial of the permit upon the applicant's supporting shippers. . . ." (R. 409).

The Court further concluded that the Commission had in this case improperly applied a general presumption that the protesting carriers would be adversely affected by the loss of traffic they had never handled and would not handle if the application were denied (R. 410).

SUMMARY OF ARGUMENT

Congress in 1957 sharply defined and limited the competitive role of contract carriers in the transportation industry. The 1957 changes in the statute made unnecessary and inapplicable prior decisional standards applied by the Commission in considering applications for contract carrier permits. New and different standards were written by Congress into section 209(b) governing the consideration of applications for contract carrier authority, to reflect the limited competitive role of the contract carrier in serving the distinct needs of one or a limited number of shippers.

The Commission, in considering Reddish's application, wholly failed to consider or apply the criteria specified by Congress in section 209(b) to govern the grant of contract carrier permits. Instead, the Commission (1) applied a presumption of adverse effect upon the services of existing common carriers by the grant of the Reddish application to transport canned goods shipments the protesting carriers had not transported and would not transport if the application were denied; (2) required that Reddish and his supporting shippers make a positive showing that existing carriers

would not meet the shippers' reasonable transportation needs, as a condition to the grant of the application; and (3) excluded from consideration the testimony of the shippers that the successful conduct of their businesses required transportation of canned goods at a cost competitive with private carriage and truckload rates proposed by Reddish and not available from the protesting carriers.

Such presumptions, requirements of proof, and exclusion of costs in terms of rates are based upon the pre-1957 status of contract carriers. The requirements thus imposed on contract carriers are justified neither by the terms of the statute nor the limited and special nature of contract carrier service now authorized under the statute. The Commission in fact has imposed on Reddish, as a condition to the grant of his application, requirements of proof that were not written into the Act because they were improper and unnecessary to the consideration of contract carrier applications. The standards applied to the disposition of the Reddish application deny the existence of the inherent advantages resulting from the limited obligations imposed, and the limited services permitted to be performed by contract carriers under the Act. As a practical matter, the consequence of the Commission's failure to consider the standards now specified in the Act for the consideration of contract carrier applications is to deny contract carriers the opportunity to compete with unregulated private motor truck operations. The Commission leaves shippers a choice only between motor common and private carriage.

ARGUMENT

I.

The Interstate Commerce Act, as Amended in 1957, Does Not Require or Permit the Commission to Presume That the Grant of Reddish's Application Will Adversely Affect the Protesting Common Carriers.

Congress in 1957 made substantial and fundamental changes in the provisions of the Interstate Commerce Act relating to contract carriers by motor vehicle. The definition of a contract carrier in section 203(a)(15), 49 U.S.C. 303(a)(15), was amended to require that contract carrier service be performed for ". . . one or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer." Section 209(b) was amended to give the Commission power to attach to new contract carrier permits, among other terms, ". . . limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation. . . ."

Congress by these changes empowered the Commission specifically to limit a contract carrier's service to designated shippers by name and number. Prior to 1957 the Commission had no such power. A contract carrier was free to add contracts and shippers within the commodity and geographical scope of its permit, and aggressively to seek new business within those limits. *United States* v. *Contract Steel Carriers*, 350 U.S. 409. As a consequence, contract carriers were free to compete with common carriers for transportation business generally, for all existing and potential

traffic in the commodities and within the area served by the contract carrier. The 1957 amendments were designed to restrict this ability of contract carriers to compete with common carriers, and to provide a clear line of demarcation between common and contract carriage. S. Rep. No. 703, 85th Cong., 1st Sess. (1957), p. 37; see also H.R. Rep. No. 970, 85th Cong., 1st Sess. (1957), p. 1.

The 1957 amendments further emphasized departure from the prior position of contract carriers under the Act, by adding to section 212 a new subsection (c). The new 212(c) provides that contract carriers whose operations prior to 1957 were found not to have been limited to transportation for one or a limited number of persons as required under the new definition of contract carriage, were to receive, without proof of public convenience and necessity,[5] certificates to operate as motor common carriers.

This sharply changed character of the contract carrier, and the limitations imposed on the ability of new contract carriers to compete with common carriers, made inapplicable the decisional standards the Commission had adopted prior to 1957, in determining whether an application for a contract carrier permit should be granted under the general and undefined statutory provisions of "consistent with the public interest and the national transportation policy." The Com-

[5] Section 207(a) of the Act, 49 U.S.C. 307(a), requires an application for motor common carrier authority to establish that the proposed operation "is or will be required by the present or future public convenience and necessity."

mission, prior to the 1957 amendments, had been faced with an increasingly difficult problem of making any clear distinction, as between common and contract motor carriage, that would effectively confine contract carriers to one or a limited group of shippers. Contract carriers were free, once a permit was obtained, to compete for all traffic, present and potential. The Commission had no ready means to confine, or even to determine the extent of, the competitive effect on common carriers by rail and motor resulting from the grant of a permit. The Commission, under these circumstances, applied to the general statutory standard, "consistent with the public interest and national transportation policy" provided in section 209(b) of the Act, a requirement that an applicant for such authority prove that the services of existing carriers would not or could not meet the reasonable requirements of the shippers supporting the application.[6] As applied by the Commission, the standard of "consistent with the public interest and national transportation policy" in contract carrier applications was in practical effect no different than the standard of "public convenience and necessity" applied under section 207(a) of the Act to common carrier applications. Compare *William Heim Cartage Co., Inc.—Extension—Indianapolis*, 20 M.C.C. 329, 331, a contract carrier case, with *Central and*

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[6] *William Heim Cartage Co., Inc.—Extension—Indianapolis*, 20 M.C.C. 329, 331; *Hibbard Extension of Operations—Lime*, 47 M.C.C. 311, 314; *Melton Contract Carrier Application*, 49 M.C.C. 59, 62; *Walter C. Benson Co., Inc.—Extension—N.Y., N.J., and Pa.*, 61 M.C.C. 128, 130.

Southern Truck Lines, Inc., Common Carrier Applications, 84 M.C.C. 126, 130.

Congress, recognizing the sharply changed nature of the contract carrier, and the limited extent of the competition that would result from limited contract carrier operations, wrote into section 209(b) specific criteria to be considered by the Commission in determining whether the public interest and national transportation policy would be served by a grant of a contract carrier application. Section 209(b) was amended to require that: "In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act, the Commission shall consider [1] the number of shippers to be served by the applicant, [2] the nature of the service proposed, [3] the effect which granting the permit would have upon the services of the protesting carriers, [4] and the effect which denying the permit would have upon the applicant and/or its shipper and [5] the changing character of that shipper's requirements."

Under these criteria, the permissible inquiry is limited. Since the new contract carrier will not be free to compete for unknown and merely potential shippers, the inquiry as to competitive impact upon protesting common carriers is limited to considerations relating to the specific traffic of the shippers to whose service the contract carrier will be limited. Section 209(b) limits that inquiry to the "effect of a grant of the application upon the *services* of the protesting carriers." The statutory language thus limits consideration to those carriers protecting the application. More im-

portantly, it directs consideration of effect upon the *services* of the protesting carriers. The question is whether transportation by Reddish of canned goods for Steele, Cain and Keystone will affect the services protesting common carriers render for the public generally.

There was no evaluation or consideration by the Commission of the extent, if any, to which Reddish's service on behalf of Steele, Cain and Keystone would have any effect on the services of the protesting carriers. Indeed, there was no effort on the part of the protesting carriers to show that their services would in any way be affected by the grant of the Reddish application. There was no suggestion that the services, or the finances and facilities with which the protestants render services to shippers generally, would in any way be affected by the grant of Reddish's application, or had, in fact, been affected by Reddish's operation under temporary authority. The record contains nothing more than a description of the services offered by protesting carriers to the public, a description of their facilities, and a statement of their desire to handle such shipments as their certificates may authorize and their methods of handling shipments might permit.

The Commission wholly avoided its duty under the statute to evaluate the extent to which the grant of Reddish's application would affect the services of the protesting carriers, by applying a presumption that authorization of a new contract carrier to handle traffic that a common carrier protestant can efficiently handle would have an adverse effect on the service of that protestant. Such a presumption relieves protesting common carriers of the need to make any factual

demonstration that granting an application would have any effect upon their services. The presumption is applicable, as the Commission makes clear in this case, even though the protesting common carriers have, in fact, never handled the traffic that the contract carrier proposes to handle, and where the Commission finds that the traffic will, if the application is denied, not be transported by the protesting common carriers. This sweeping presumption is the only basis for the Commission's conclusion that authorization of Reddish would have an adverse effect on the protesting carriers (R. 394).

We submit that such presumptions of adverse effect are not permitted under section 209(b), as amended. A presumption of adverse effect may be warranted in applications for certificates of public convenience and necessity under section 207(a), where the new entrant will necessarily be a competitor for all present or potential traffic. It may have been warranted in the consideration of applications for unrestricted contract carrier permits prior to the 1957 amendments. It has no application here, where Reddish is to be limited, now and in the future, to the traffic of Steele, Cain and Keystone. The Commission, in disposing of the application on such a presumptive basis, failed to discharge the duty imposed upon it by section 209(b), to consider the effect that granting Reddish's application would have on the services of the protesting carriers.

The appellants suggest that the Commission's construction and application of the present statutory criteria are necessary to protect common carriers from the "destructive effects of over competition" in the industry (Brief of the Commission, p. 8). Neither the

language of the statute nor the limited and special role permitted to contract carriers under the 1957 amendments indicates that the Commission is empowered to impose barriers to contract carriage not contained in section 209(b), as a means of protecting common carriage from competition. The Commission exceeds its powers when it imposes barriers not enacted by Congress. *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83.

The argument further overlooks the Commission's findings, which establish that the common carriers long ago lost any competitive struggle for this traffic. It was lost to unregulated private carriage operations conducted by the canning companies as early as 1948, when Steele began using its own motor vehicles. Reddish is a competitor of these private carriage operations, not of existing common carriers. The Commission in this case denies to Reddish the opportunity to discharge the role that a limited contract carrier is designed to perform in the transportation industry, that of an alternative to the continual expansion of private carriage operations performed by the shippers.[7]

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[7] See the testimony before the Senate Committee considering the 1957 amendments revising the contract carrier provisions of the Act, in Surface Transportation—Scope of Authority of I.C.C., Hearings before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce (1957), pp. 214, 312, 345-346 (hereafter cited as "Hearings").

II.

Reddish and His Three Shippers Are Not Required Under Section 209(b) of the Act to Establish That the Services of Existing Carriers Are Inadequate to Transport Canned Goods.

Section 209(b) requires the Commission to consider the effect denial of a contract carrier's application would have on the supporting shipper. The Commission held that whether the shippers will be adversely affected by a denial of the application depends upon "a determination of whether existing service is adequate to meet their transportation requirements" (R. 394). Although holding that such a determination is necessary, the Commission never makes one. Instead, after characterizing the evidence of record, other than evidence pertaining to rates, as "devoid of any substantial showing of dissatisfaction" and as "complaints . . . of a general nature and not substantiated by reference to specific instances," the Commission concludes: "In the absence of a more positive showing that existing service will not meet shipper's reasonable transportation needs, we are not warranted in finding that a new service should be authorized or shippers will be adversely affected by a denial of this application" (R. 394). The Commission never finds that the existing service is in fact adequate. It merely concludes that ". . . the supporting shippers have failed to show that they are unable to obtain reasonably adequate service upon request" (R. 394).

The Commission erred in imposing such a burden on Reddish and the supporting canning companies. The legislative history of 209(b) plainly demonstrates that an applicant for a contract carrier permit and his supporting shippers were not to be required to discharge such an onerous burden of proof, in the light of the

limited and distinct services contract carriers were authorized to perform under the Act after 1957. The Commission initially proposed that Congress include in section 203(a)(15) a requirement that contract carrier service be limited to the special and individual nature required by the customer, and also that it be a "service not provided by common carriers." At the same time, the Commission proposed that section 209(b) be amended to require a showing that "existing common carriers are unwilling or unable to provide the type of service for which a need has been shown." These proposals were opposed by contract carriers, by shippers, by the Departments of Commerce and Justice, on the ground that they would effectively put an end to the extension of contract carrier service. Sen. Report No. 703, 85th Cong., 1st Sess., p. 5; see also Hearings, pp. 11, 202-203, 214, 303, 308, 311-312, 345-346. These proposals were ultimately withdrawn by the Commission, upon "further consideration," because of the "very difficult burden of proof imposed on applicants" (Hearings, p. 27). As the text of the Act shows, the Senate and House Committees did not recommend, and Congress did not enact, such a requirement. The Court below pointed out that the so-called adequacy of service standard, as applied in this case, was no different than the imposition upon Reddish and the canned goods shippers of the burden of proving that existing carriers were unable or unwilling to transport their shipments (R. 407). The Commission's conclusion—"in the absence of a more positive showing . . . we are not warranted in finding . . . the supporting shippers will be adversely affected"—demonstrates that the Commission imposed on Reddish and the supporting shippers precisely that "very difficult burden" of proof opposed by shippers, contract carriers, and others before the

Committees considering the 1957 amendments. That burden had been specifically rejected by those Committees as inappropriate to the consideration of a contract carrier application.

The Commission erred not only in applying an entirely impermissible standard to its consideration of this application, but, as the Court below held, in making the lack of a positive showing of inadequate service decisive of the outcome. There is no suggestion that existing common carriers may not, in proceedings on contract carrier applications, show the extent and nature of their services. The protesting carriers did that without objection in the *Reddish* case. A finding by the Commission that existing service does, in fact, meet the transportation requirement, would undoubtedly be relevant to consideration of the effect upon the shipper of the application's denial. The Commission however, did not make such a finding or undertake a consideration of effect on the shippers. Measured, as it must be, in terms of the findings actually made by the Commission, its action can not be sustained as a proper discharge of its duties under the statute.

III.

The Lower Costs and More Responsive Service Available to the Shippers Through the Inherent Advantages of Reddish's Contract Carrier Service Must Be Considered by the Commission in Its Determination of the Effect Upon the Shippers of a Denial of the Application.

The Commission was unable to make any unequivocal finding that the service of existing carriers was adequate to meet the shippers' transportation needs, because it was compelled to find that the shippers had not used such services in the past and would not use them in the future. The Commission reached this paradoxical position by refusing to consider, as a part of the "reasonable transportation needs" or "real need" of the shippers, the canning companies' need for a small-shipment pool-truckload service equivalent in cost and service to private carriage and truckload cost and service. The interest of any commercial shipper in supporting a need for transportation service is, of course, an economic one. Whether a shipper's evidence respecting his distinct "need" is couched in terms of a requirement for rapid service to meet customer demands, or in terms of his need for transportation of small shipments in consolidated loads because of lower cost, the evidence is, in the ultimate analysis, credible only in terms of the transportation necessary to enable the shipper to sell his goods at a profitable and competitive price to his customers. A showing that the cost of the services of existing common carriers would so affect the shipper's prices in relation to those of his competitors as to injure his ability to compete with them, is involved in any aspect of shipper needs, including those the Commission suggests it would consider; for example, slow transit time (R. 394).

The Commission's refusal to consider in this proceeding the need for transportation at a cost equivalent

to private carriage, denies the existence of the very factors that distinguish contract carriage from common carriage by motor vehicle. Contract carriage under the Act, as amended in 1957, is and was designed to be a service inherently different than that performed by common carriers. The Senate Report recommending passage of the 1957 amendments stated:

> "Common and contract carriage are unlike; the degrees of regulation applicable to them are unequal; their functions in our national transportation system are unlike. These inherent differences are such as require statutory language clearly capable of being administered and interpreted so as properly to reflect these differences." S. Rep. No. 703, 85th Cong., 1st Sess., pp. 6-7.

Contract carriers are, as the Examiner found the canning companies want Reddish to be, the "transportation department" of the shippers. As such, Reddish has cost advantages, as the record here shows, in the performance of service for his shippers. Reddish has no terminal and no terminal expenses (R. 52). He needs no terminals for the handling of shipments. The small shipments are pooled in a truckload and loaded at the canning plants by the shippers (R. 61). Shipments are transported by Reddish without "interline" or terminal handling from the canning plant direct to the customer (R. 94). Reddish has no staff of solicitors and no advertising expenses in seeking business (R. 55-56). As the "transportation department" of the canners, the movement of Reddish's vehicles is coordinated with, and directly related to, sale and outbound movement of the canned goods produced by these three shippers, and inbound movement of supplies necessary for production. Common carriers, as a

part of their "holding out" and in performance of service for the general public, maintain terminals for the assembly and transfer of shipments, advertise their services generally and solicit the shipping public, engage in joint line arrangements with other carriers for the through movement of freight, and schedule their equipment and operations in response to the demands of the shipping public generally. These inherent differences between common and contract carriers result in cost advantages to the contract carrier in performing service for his shipper, as the Chairman of the Commission pointed out to the Committee during the consideration of the 1957 amendments to the Act (Hearings, p. 27).[8]

The present case does not present the situation of an application for a motor common carrier certificate, under section 207(a) of the Act, opposed by other motor common carriers. In an application for a common carrier certificate, the applicant necessarily proposes to assume the same burdens and obligations to render service to the general public, as existing motor common carriers. There is nothing inherently different in such a proposed service to suggest that another common carrier assuming the same duties would be able to perform service at a lower cost, unless the existing rates of motor common carriers are unreasonably and improperly high. Similar considerations may have been applicable in the disposition of applications of contract carriers prior to 1957.

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[8] The Commission, even at a time prior to the 1957 amendments to the Act, recognized the inherent cost advantages of contract carriage in relation to common carrier service. See: *Contracts of Contract Carriers*, 1 M.C.C. 628, 630; *Contract Minimum Charges from and to Baltimore, Maryland*, 32 M.C.C. 273, 283.

The Commission, in excluding the inherent differences in contract and common carriage and the resulting cost advantages, obliterates the sharp distinction created by the 1957 amendments. The consequence is that the Commission is able to define the shippers' "reasonable transportation needs" without any consideration of the really basic need of Steele, Cain and Keystone for transportation of small shipments at a cost that will permit them to compete with other canners making deliveries with private trucks or at truckload rates. Such a definition of the transportation needs of the canning companies permits the Commission to consider the adequacy of available service to meet the shipper's needs in a wholly unrealistic fashion. The Commission's definition of "reasonable" need is so unrelated to the business factors governing the canning industry that the shippers would be forced out of business if it were actually followed.[9]

This Court, in *Schaffer Transportation Co.* v. *United States, supra,* pointed out that the national transportation policy does not permit the Commission to ignore inherent advantages of common carrier motor service, including cost advantages, in its evaluation of an ap-

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[9] The Court below, treating the Commission's report as finding that the shippers would not be adversely affected by a denial of the application, held that such a finding was not supported by substantial evidence (R. 405-406). We agree that such a finding could not be supported by substantial evidence in the record of this proceeding, for the reasons given by the Court (R. 406). We can find, however, no conclusion by the Commission that the shippers would not be adversely affected. The report of the Commission does no more than conclude that "there has been no convincing showing by applicant that the supporting shippers have a real need for the proposed contract carrier service."

plication for a motor common carrier certificate opposed by common carriers by railroad. To do so, this Court held, would provide unwarranted protection against competition and would run counter to the national transportation policy, which requires the Commission to heed service efficiencies resulting from the inherent advantages of one transportation service in relation to the other.

These considerations apply with equal force here. Inherent differences resulting in cost advantages arise not only by differences in the mode of transport, but also by the sharply different functions and obligations of common and contract motor carriers in the services the statute requires each to offer and perform.

We submit that the Court below properly held that, under the present statutory standards, lower costs to the shippers in the form of rates resulting from the inherent advantage of contract carrier service may not be ignored by the Commission in its evaluation of Reddish's application.

CONCLUSION

Appellee, Elvin L. Reddish, for all of the foregoing reasons submits that the judgment of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX

Statutes Involved

The National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding section 1, provides:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 203(a)(15) of the Interstate Commerce Act, 49 U.S.C. 303(a)(15), as amended on August 22, 1957, 71 Stat. 411, Public Law 85-163, 85th Cong., provides:

> "The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) of this section and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transporta-

tion services designed to meet the distinct need of each individual customer."

Section 209(b) of the Interstate Commerce Act, 49 U.S.C. 309(b), as amended on August 22, 1957, 71 Stat. 411-412, Public Law 85-163, 85th Cong., provides:

"Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 310 of this title, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this chapter and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act; otherwise such application shall be denied. In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may per-

form transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under section 304(a)(2) and (6) of this title: *Provided,* That within the scope of the permit and any terms, conditions or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require: *Provided further,* That no terms, conditions or limitations shall be imposed in any permit issued on or before August 22, 1957 which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit; or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 303(a)(15) of this title, as in force on and after August 22, 1957."

Section 212(c) of the Interstate Commerce Act, 49 U.S.C. 312(c), as added on August 22, 1957, 71 Stat. 411, Public Law 85-163, 85th Cong., provides:

"The Commission shall examine each outstanding permit and may within one hundred and eighty days after August 22, 1957, institute a proceeding either upon its own initiative, or upon application of a permit holder actually in operation or upon complaint of an interested party, and after notice and hearing revoke a permit and issue in lieu thereof a certificate of public convenience and necessity, if it finds, first, that any person holding a permit whose operations on August 22, 1957, do not conform with the definition of a contract carrier in section 303(a)(15) of this title as in force on and after August 22, 1957; second, are those of a common carrier; and, third, are otherwise lawful. Such certificate so issued shall authorize the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in the permit."